Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
	)
FCI 900, Inc. Expedited Request For 3-Year Extension of 900 MHz Band Construction Requirements	)
	)
And	)
	)
Neoworld License Holdings, Inc. Request for Waiver of 900 MHz Band Construction Requirements and Petition for Declaratory Ruling	)
	)

ORDER ON RECONSIDERATION

Adopted: August 16, 2002 **Released: August 21, 2002**

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Wireless Telecommunications Bureau (Bureau) has before it a Petition for Reconsideration filed on June 25, 2001 by Cingular Interactive, L.P. (Cingular) seeking reconsideration of a statement made in a Memorandum Opinion and Order adopted May 25, 2001 in the above-captioned proceeding (*MO&O*).[1] Specifically, Cingular asks that the Bureau vacate the part of the *MO&O* that states that 900 MHz Specialized Mobile Radio (SMR) service Major Trading Area (MTA) licensees that are seeking to satisfy their five-year requirement by a showing of substantial service must make that showing on an MTA-by-MTA basis. For the reasons stated below, we deny Cingular's petition.

II. BACKGROUND

2. When the Commission established service rules for the second phase of licensing in the 900 MHz SMR service (900 MHz Phase II), it decided to use MTAs as the service area for future 900 MHz SMR licensing.[2] Within each MTA, the Commission created 20 blocks of 10 contiguous channels, deciding that "each 10-channel block should be separately licensed."[3] The Commission also adopted

[1] Petition for Reconsideration filed by Cingular Interactive, L.P. on June 25, 2001 (Cingular Petition). *See also* FCI 900, Inc. Expedited Request For 3-Year Extension of 900 MHz Band Construction Requirements and Neoworld License Holdings, Inc. Request for Waiver of 900 MHz Band Construction Requirements and Petition for Declaratory Ruling, *Memorandum Opinion and Order*, 16 FCC Rcd. 11072 (WTB 2001) (*MO&O*).

[2] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket 93-252, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, PR Docket 89-553, *Third Report and Order*, 9 FCC Rcd. 7988, 8050-51 (1994) (*CMRS Third Report and Order*).

[3] *Id*. at 8051.

construction requirements for these licenses similar to those established for other wide-area Commercial Mobile Radio Service (CMRS) licenses.[4] Specifically, the Commission required a 900 MHz MTA licensee to construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of its MTA within three years of original license grant, and at least two-thirds of the MTA population within five years of original license grant.[5] As an alternative to population coverage, an MTA licensee was also permitted to demonstrate at the five-year mark that it is providing substantial service.[6] Furthermore, the Commission provided that if an MTA licensee failed to timely meet these construction requirements, it forfeited the license except for any grandfathered sites it held prior to MTA licensing.[7]

3. In January 2001, two 900 MHz MTA licensees, FCI 900, Inc., a wholly-owned subsidiary of Nextel Communications, Inc. (collectively, Nextel) and Neoworld License Holdings, Inc. (Neoworld), filed separate requests seeking an extension of the 900 MHz MTA construction period.[8] Along with its extension request, Neoworld also requested that the Bureau make a declaratory ruling on the sufficiency of its substantial service showing, asserting that "the substantial service test contemplates a showing of ongoing commitment to system implementation, although not necessarily on an MTA-by-MTA basis."[9] On May 25, 2001, the Bureau addressed the requests in the *MO&O*, finding that an extension of the construction deadline for all 900 MHz MTA licensees (until December 31, 2002) was in the public interest to "allow the introduction of innovative digital 900 MHz voice services, thus benefiting consumers and promoting competition."[10] Moreover, in addressing Neoworld's request for a declaratory ruling, the Bureau declined to issue such a ruling because Neoworld had not sufficiently described how it would make a satisfactory demonstration of service to the public.[11] The Bureau did, however, make the following statement in response to Neoworld's assertion: "We take this opportunity to clarify that 900 MHz MTA licensees seeking to satisfy the construction requirement by a showing of substantial service must make that showing on an MTA-by-MTA basis."[12]

4. On June 25, 2001, Cingular filed the instant petition, requesting that the Bureau vacate "its arbitrary and unreasoned decision to require 900 MHz licensees [that are] seeking to satisfy their five-

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4 *Id*. at 8077.

5 *See* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket 89-553, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 10 FCC Rcd. 6884, 6898 (1995) (*900 MHz Second R&O*). *See also* 47 C.F.R. § 90.665(c).

6 At the three-year construction deadline, each licensee was required to notify the Commission either that it had met the one-third-coverage requirement or that it intended to submit a showing of substantial service at the five-year mark. The Bureau waived the requirement that a licensee electing substantial service must also at the three-year mark describe how it intends to demonstrate substantial service at the five-year mark. *See* Construction Requirements for Metropolitan Area-Based Licenses in the 896-901/935-940 MHz Band, *Order,* 14 FCC Rcd. 13223 (WTB 1999).

7 *900 MHz Second R&O* at 6899. *See also* 47 C.F.R. § 90.665(d).

8 *See* Letter dated January 9, 2001 from Robert S. Foosaner, Senior Vice President, Government Affairs, Nextel to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission and Request for Waiver of 900 MHz Band Construction Requirements and Petition for Declaratory Ruling filed on January 10, 2001 by Neoworld License Holdings, Inc. (Neoworld Petition).

9 *See MO&O* at 11082, *citing* Neoworld Petition.

10 *Id*. at 11076.

11 *Id*. at 11082.

12 *Id*.

year construction requirement by a showing of substantial service [to] 'make the showing on an MTA-by-MTA basis.'"[13] On July 18, 2001, Small Business in Telecommunications (SBT) filed an Opposition to Cingular's Petition for Reconsideration.[14] On August 3, 2001, SBT informed the Commission that, due to an administrative error, it had not served the parties to the proceeding when it originally filed its July 18, 2001 pleading, but had done so on August 3, 2002.[15] At the same time, SBT also filed a motion for leave to accept its Opposition as untimely, or, in the alternative, treat the pleading as an informal objection, pursuant to section 1.41 of the Commission's rules.[16]

III. DISCUSSION

5. Cingular makes three arguments as to why the Bureau should allow a 900 MHz MTA licensee to meet the construction requirements for multiple licenses that it holds by demonstrating that it is providing substantial service across its entire network, thereby relieving the licensee of the construction requirements for any one particular license. For the reasons set forth below, we deny Cingular's petition for reconsideration and reaffirm the clarification in the *MO&O* that a separate showing for each 900 MHz license is required to demonstrate compliance with the construction requirements.

6. Cingular first asserts that the statement affects substantive rights of all 900 MHz MTA licensees and, therefore, should be considered a substantive rule which requires, under Section 553 of the Administrative Procedure Act (APA), agencies to afford notice of a proposed rulemaking and an opportunity for public comment.[17] Cingular supports this assertion by arguing that reviewing substantial service showings on a license-by-license basis "runs counter to the service actually provided by nationwide carriers and effectively raises the bar for such carriers to make a satisfactory showing."[18] We disagree with Cingular's assertion based on the plain reading of the 900 MHz MTA construction rule and on the decisions made by the Commission in the orders adopting the rule. Section 90.665(c) of the Commission's rules reads in relevant part:

> "Each MTA licensee in the 896-901/935-940 MHz band must, three years from the date of license grant, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA; further each MTA licensee must provide coverage to at least two-thirds of the population of the MTA five years from the date of license grant. Alternatively, an MTA licensee must demonstrate through a showing to the Commission five years from the date of license grant, that it is providing substantial service."[19]

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13 Cingular Petition at 1.

14 Opposition to Cingular Interactive L.P.'s Petition for Reconsideration, filed by Small Business in Telecommunications on July 18, 2001 (Opposition). SBT indicated that it is "a non-profit association of small businesses providing goods and services throughout the telecommunications market," and "local operators of 900 MHz SMR equipment, including members who received licenses pursuant to participation in Auction 7, whereby they were granted MTA-wide 900 MHz SMR licenses." *Id*. at 1-2.

15 Letter from Robert H. Schwaninger, Jr., counsel for Small Business in Telecommunications to the Office of Secretary, Federal Communications Commission dated August 3, 2001.

16 *See* 47 C.F.R. § 1.41. Motion for Leave to File Untimely Pleading, filed on August 3, 2001 by Small Business in Telecommunications (Motion). Based on our denial of Cingular's petition, SBT's Opposition and Motion are moot and we need not address either the timing or the merits of SBT's pleadings.

17 5 U.S.C. § 553. Cingular Petition at 4-5.

18 *Id*. at 5.

19 47 C.F.R. § 90.665(c).

Cingular argues that "given that the Commission's two-thirds population coverage alternative is an MTA-based analysis, it is reasonable to assume that the substantial service alternative allows for other means to demonstrate coverage, *e.g.*, on a nationwide basis."[20] In fact, we conclude that, without express language to the contrary, the opposite is true: the fact that population coverage is particular to an MTA indicates that the construction requirements follow each license, and therefore, each license must satisfy the construction benchmark, whether by population coverage or by substantial service.

7. This interpretation of section 90.665(c) is supported by the two orders adopting the 900 MHz Phase II service rules, the *CMRS Third R&O* and the *900 MHz Second R&O*, wherein the Commission made decisions that effectively tied the construction requirements to its adoption of MTAs as the service areas. First, the Commission decided to use MTAs as the service areas for Phase II 900 MHz licensing, rejecting "larger regional service areas or licensing on a nationwide basis, because use of these larger service areas could unnecessarily restrict entry into the 900 MHz market to a very small number of licensees."[21] Second, the Commission created 20 blocks of 10-channels in each MTA, stating that each block should be separately licensed.[22] Finally, the Commission decided that each license should have construction requirements, specifically stating that "[b]ecause we are using MTAs as opposed to nationwide licensing of the 900 MHz systems, we believe that the five year construction requirement is appropriate."[23] Accordingly, when the Commission adopted the specific population coverage requirements for each MTA,[24] it clearly intended to require each license in each MTA to have a certain minimal level of construction.

8. Cingular argues that, as an alternative to meeting the construction requirement by demonstrating coverage to a portion of the MTA's population, it is reasonable to assume that the substantial service showing allows for a demonstration on a different basis than by MTAs.[25] As before, we reject that argument. As explained by the Commission, the substantial service alternative for this service provides a licensee with the flexibility of not meeting the population or geographic coverage requirements in an area.[26] But nowhere did the Commission indicate that the substantial service test was to be applied on other than an MTA-by-MTA basis. Rather, it described that multiple MTA coverage would be considered a factor in evaluating whether the licensee is providing substantial service.[27] Such a statement differs significantly from, and is not consistent with, a Commission intent that a licensee that holds multiple MTA licenses would be permitted to meet the construction requirements for individual licenses based on the build-out of other licenses. Thus, we find that the Commission's orders demonstrate that the substantial service test was intended to implement the Commission's fundamental judgment that 900 MHz licensing occurs on an MTA-by-MTA basis. Because the decision to condition each license with construction requirements was made under proper rulemaking procedures, including

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20 *Id*. at 9-10.

21 *CMRS Third R&O* at 8051.

22 *Id*.

23 *CMRS Third R&O* at 8077; *900 MHz Second R&*O at 6897-99.

24 *900 MHz Second R&O* at 6898.

25 Cingular Petition at 9-10.

26 *900 MHz Second R&O* at 6898. The Commission also concluded substantial service is "appropriate for 900 MHz because several current offerings in this band are cutting-edge niche services." *Id*.

27 *Id*. at 6887. *See also*, Cingular Interactive, L.P. Showing of Substantial Service Pursuant to Section 90.665(c), *Order*, 16 FCC Rcd. 19200, 19203 (WTB 2001) (*Cingular Order*) (Bureau states the nationwide nature and scope of the network is relevant under the service's construction standards in determining the sufficiency of service in each of Cingular's individual license areas). There is no indication in either order that the multiple MTA coverage would excuse a licensee from the construction obligation placed on each individual license.

adequate notice and comment in both proceedings, we find that the statement in the *MO&O* reiterating the Commission's position was not a substantive rule, and therefore, did not violate Section 553 of the APA.

9. Cingular also asserts that the decision to evaluate substantial service on an MTA-by-MTA basis was made a number of years into the construction period and, therefore, violates fair notice principles.[28] Cingular adds that because it could lose its license for failure to make a satisfactory service showing, "fundamental fairness requires a clear enunciation of the components of substantial service."[29] Cingular argues that the statement made in the *MO&O* came "too late for licensees who formulated their plans for demonstrating substantial service as long ago as the three-year mark based upon a reasonable interpretation of what constitutes substantial service."[30] We disagree with Cingular's assertion because, as explained above, the decision to evaluate substantial service on a license-by-license basis was made when the Commission adopted the service and licensing rules for 900 MHz Phase II licenses. Accordingly, Cingular was on notice, prior to becoming an MTA licensee, that the Commission's construction requirements required licensees electing substantial service to make their showings on a license-by-license basis. Moreover, the *MO&O* clarifying this requirement was made with a significant period left in Cingular's construction period (*i.e.*, 19 months). We also note that, since filing its petition for reconsideration, Cingular asked the Bureau for a declaratory ruling on its preliminary substantial showing and, in turn, was given specific direction by the Bureau on how it can meet that standard.[31] We, therefore, find no merit in Cingular's assertion that it did not receive fair notice of its obligations under the Commission's construction requirements.

10. Finally, Cingular argues that the decision to evaluate substantial service on an MTA-by-MTA basis does not reflect reasoned decision-making, and that the Bureau failed to provide "any reason whatsoever for the decision."[32] We disagree with this argument. As stated above, the decision to license 900 MHz Phase II on an MTA basis and to attach construction requirements to each license was made in several Commission orders (*i.e.*, the *CMRS Third R&O*, the *900 MHz Second R&O*, and even the *900 MHz Second Order on Reconsideration*[33]), all of which provided adequate notice and comment and were based on reasoned decision-making.[34] Moreover, to the extent that Cingular reiterates its assertion that the decision to evaluate substantial service showings on a license-by-license basis "ignores the realities of carriers who provide 900 MHz service on a nationwide basis,"[35] we note again that the Commission specifically rejected nationwide licensing for Phase II 900 MHz licensing.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to authority delegated by Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 0.331 and 1.106 of the Commission's

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28 Cingular Petition at 6-8.

29 *Id*. at 6-7.

30 *Id*. at 8.

31 *Cingular Order*.

32 Cingular Petition at 9-10.

33 Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket 89-553, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd. 2639 (1995) (*900 MHz Second Reconsideration Order*).

34 Any interested party, including all potential 900 MHz MTA licensees, had the opportunity to offer a different licensing scheme, either originally or on reconsideration, and provide reasons why the different licensing approach would be preferable.

35 Cingular Petition at 9.

rules, 47 C.F.R. §§ 0.331, 1.106, the Petition for Reconsideration filed by Cingular Interactive, L.P. on June 25, 2001 is hereby DENIED.

12. IT IS FURTHER ORDERED, pursuant to authority delegated by Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Motion for Leave to File Untimely Pleading, filed by Small Business in Telecommunications on August 3, 2001 IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Deputy Chief, Wireless Telecommunications Bureau